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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1628

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION,
Petitioners

v.

COLUMBIA BROADCASTING SYSTEM, INC. CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC., AND DENA PICTURES, INC.
Respondents

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

Pursuant to Rule 42 of the rules of this Court, National Cable Television Association, Inc., (NCTA) files this Brief Amicus Curiae in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The parties to this case have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The National Cable Television Association, Inc. (NCTA) is the only national trade association representing the cable television industry. Its membership includes approximately 1,200 cable television systems serving nearly 4,000,000 subscriber-homes which is about two-thirds of the television homes in the United States served by cable television. Among other trade association activities, NCTA, 8 affiliated regional and 41 state cable television associations, collect and disseminate to their membership and the public information of general interest concerning the cable television industry. NCTA also represents the industry in proceedings in the federal and state courts, the United States Congress, state legislatures, and state and federal regulatory agencies on legal and legislative matters of industry-wide interest.

The issue of copyright liability for the reception of television broadcast signals under the 1909 Copyright Act is vitally important to the cable television industry. The expansion of the copyright monopoly would carry with it the potential for litigation which could bankrupt the cable television industry in an attempt to satisfy the potentially huge amount of accrued damages. NCTA's interest in such a matter goes to the very heart of cable television's future as a new and developing communications technology.

ARGUMENT

I. Liability Under the 1909 Copyright Law Would Have a Grave Impact on the Cable Television Industry

The lower court's decision that cable television systems are liable for copyright under the 1909 Copyright Act when they receive and distribute "distant" broadcast signals would have a disastrous economic effect on present and planned cable system operations.

Although the lower court's definition of a "distant" signal is so vague as to be almost unworkable, some notion of the decision's impact on existing systems can be estimated by extracting certain information from Television Factbook, 1973 edition, and Television: 1972 Television Market Analysis, published by the American Research Bureau. Assuming that most broadcast signals which are received by a cable system via microwave would be "distant" signals under the court's test,1/ the facts show that almost 24% (652) of all cable systems receive some or all of their television signals in that fashion. In terms of serving the public, more than half of these systems are carrying presumably "distant" signals in order to have all three networks represented on the system. In fact, 89.6%, or 584 of these systems, use microwave to receive at least one television signal which

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1/ It is possible to prove otherwise in some cases, but the court has placed a very heavy burden on the cable system to show that such a signal is receivable off-the-air in or near the cable community. On the other hand, some signals not received via microwave may prove to be "distant" because of distance and antenna location.

is either not duplicated locally off-the-air or contributes to providing "adequate service" to the community.2/ Thus, it can be seen that for a large number of cable systems, the carriage of "distant" signals is not a profitable luxury, but rather a vital component of their very existence as well as the rendering of a valuable public service.

Planned cable operations are hit equally as hard. After a several-year freeze on new distant signal carriage, the FCC began to process requests in July of 1972 under its new rules. As of May 23, 1973, according to data available from the FCC, 649 existing systems had been given permission to add distant signals (the FCC's definition), as were 390 proposed systems. In addition,

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2/ In its rules relating to required and permissible carriage of television broadcast signals, 47 C.F.R. §76.51-76.65, the FCC sets up a standard of "adequate service" to a community. This is defined as three networks and three independents for the top 50 television markets, three networks and two independents for the next 50 markets, and three networks plus one independent elsewhere. Carriage of "distant" signals is permitted so as to meet these needs where local signals do not.

about 1,500 more applications await FCC action. Despite the difference in the FCC's and the court's "distant" signal definitions, it is safe to say that the vast bulk of this new signal carriage will run afoul of the court's holding.

Under these circumstances the monetary ramifications of copyright liability would be truly staggering. There are approximately 5,000 copyrighted programs on the average television station each year. Assuming minimum statutory damages of $250 per infringement,3/ a cable system carrying but one "distant" signal would owe at least $1,250,000 in damages for each year of past damages permitted under the law. The filing of a number of law suits could result in damages which would bankrupt a substantial number of cable companies. As to future permission to carry copyrighted programs, marketplace bargaining for such a vast number of programs would place an intolerable economic burden on the individual operator. The average cable system today has 2,000 subscribers, which translates out to a yearly gross income of about $120,000. That isn't a great deal of bargaining power. Furthermore, other hurdles to successful bargaining may be insurmountable. See, infra, Argument II.

In sum, the magnitude of the impact of the lower court's decision would be

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3/ 17 U.S.C. 101 (b). These figures do not include fees for music which would add more damages.

devastating to much of the cable television industry in terms of money and lost service to the public.

II. Existing Patterns of Program Distribution Would Make Marketplace Dealings with Copyright Owners Almost Impossible

Even if the economic and practical burdens were not so staggering, the established patterns of program distribution and exclusivity would render marketplace dealings for copyrighted programs almost impossible.

The commercial market for broadcast programming subsists totally on advertisers who purchase broadcast time to sell their products. Cable television, with the very limited exception of its own program origination, does not compete with the broadcaster for the advertising dollar. In fact, cable television adds to the circulation of advertising messages by the carriage of television signals to persons who could not otherwise view them. This is especially true for so-called "distant" signals.4/ This additional circulation is sold by broadcasters to sponsors, thus increasing rewards to the copyright owners. In other words, the competitive distribution market for broadcast television programs is a market in which program costs are borne by advertisers, and they in turn are interested in, and pay for,

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4/ An article in the November 29, 1972, edition of Variety tells of "the tremendous boost in reach and potential audience [independent stations are] receiving from the distant signal provision of the cable rules."

maximum circulation of their commercial message. The advertiser gets the cable circulation when he buys time from the broadcaster. The cable system, on the other hand, obtains no part of the advertisers' dollar earned by the broadcaster. It is, accordingly, the broadcaster who controls the negotiations with the copyright owner as to programs.

Obviously, then, the copyright owner gets the largest possible commercial reward from maximum circulation of his program. However, broadcasters have an interest as against other broadcasters in preventing the licensing of a program to other stations, and contracts giving territorial and time exclusivity to a broadcast station are the industry norm.

The pattern of present day exclusivity practices has resulted in networks and powerful broadcasters saving unreasonable time exclusivity for themselves. This not only means long and exclusive contracts, but also warehousing of program product by the larger and more powerful stations.5/

In its Cable Television Report and Order, 36 FCC 2d 143 (1972), the Commission granted these exclusivity rights to stations as against cable systems by restricting the

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5/ The Commission is presently looking into contract length and warehousing practices. Second Further Notice of Proposed Rule Making in Docket No. 18179, FCC 72-306, released April 11, 1972.

systems' right to receive distant television signals to a limited number of stations and then only after requiring program blackouts based on local stations' territorial program exclusivity. Run of the exclusivity contract between the copyright owners and the local stations as against cable system carriage of distant signals is permitted in the top 50 television markets and to a slightly lesser extent in markets 51-100.6/ 47 C.F.R. 76.151. More than 75% of the American people live in these markets. Under this highly protectionist system as adopted by the FCC, the broadcasters and the copyright owners have every opportunity to maximize their reward without any necessity to stretch the Copyright Act of 1909 to make cable television reception and carriage of signals a "performance". And, of course, the cable operator would have precious little opportunity to buy rights to carry programs on "distant" signals.

6/ Dr. Rolla Park's study for the Rand Corp. estimates that approximately 50% of imported program fare will have to be deleted in the top 50 markets. The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations, June, 1972.

III. Liability Under the 1909 Copyright Law Would Defeat Realization of the Federal Communications Commission's Goal of Adequate Television Service To All Communities

Copyright liability for cable television systems' reception and distribution of "distant" broadcast signals would clearly frustrate the aims of the Communications Act of 1934, 47 U.S.C. 151-609. A pervading theme of the FCC's regulation of television broadcasting, and of cable television, has been the concept of maximization of television service to all communities. Section 1 of the Communications Act charges the Commission with the duty to "make available, so far as possible, to all the people of the Unites, a rapid, efficient, nationwide and world-wide wire and radio communication service." 47 U.S.C. 151. In aid of this general purpose, the Commission is directed to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. 307 (b).

The FCC has tried several methods to maximize television reception service over the years, especially to less populous areas. 7/

7/ See Cox, The Television Inquiry, The Problem of Television Service for Smaller Communities, (1959).

Thus, seventy UHF channels were added to the original twelve VHF channels for television broadcast use. When the use of UHF channels did not develop quickly, the Commission sought, and received, "all-channel" receiver legislation from Congress in 1962. 76 Stat. 150, 47 U.S.C. 303 (s). Indeed, the stated purpose of this legislation was to promote multiple local television service through use of the UHF portion of the frequency spectrum. H. Rep. No. 1559, 87 Cong., 2d Sess., p. 3. Translators have also been used to fill in the hard-to-reach pockets in a station's service area,8/ and stations have been permitted to establish satellite operations on unused channels in more distant small communities. However, none of these schemes have been entirely satisfactory to date.9/ Only the advent of cable television has made possible the realization of the Commission's goal of bringing adequate television reception service to virtually all of the nation's smaller communities. Cable television, with its multi-channel capacity and its non-advertiser supported economic base, has been able to do what television stations cannot, namely, bring

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8/ 47 CFR 74.701, 74.731.

9/ See, e.g., Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, (1965), p. 22.

multiple, diverse television reception to the "several States and communities". The Commission has always recognized this fact even when its regulation of cable television with respect to the well-served larger cities was the most restrictive. See Second Report and Order in Docket No. 15971, 2 FCC 2d 725 (1966). Later, having observed that cable television was beginning to really satisfy television reception needs, the Commission promulgated a rule requiring cable television systems with more than 3500 subscribers to originate their own programming, thus serving as an outlet for local self-expression. First Report and Order in Docket No. 18397, 20 FCC 2d 201 (1969). Then, of course, the two major thrusts of the 1972 Cable Television Report and Order, supra, were in the areas of (i) provision of local access channels, and (ii) the carriage of sufficient broadcast television signals to insure minimum adequate television reception service to all communities. This recent comprehensive Commission action confirmed cable television's role as a major provider of television reception, especially in less populated areas. The Commission is thus using cable television as a positive tool in implementing the statutory directive to provide adequate television service to all communities.

Extending the 1909 Copyright Act to hold cable television systems liable for copyright payments because they are so geographically located as to necessitate carriage of "distant" television signals to their communities in order to provide adequate service would clearly frustrate the statutory task given to the

Commission, and would discriminate against less populous areas. Such a result would be squarely contrary to the accomplishment of the Communications Act's objectives as set out above. Furthermore, given the result in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), there would clearly be geographical discrimination if most of the systems in this case were held liable. In both Fortnightly and the instant case the use of cable television was necessary in order for the subscribers to be able to view the television signals being carried. The more remote areas of this country are already discriminated against in the matter of television service, and to distinguish Fortnightly from the instant case on this basis would be to elevate form over substance. This would particularly affect small communities where there are no television stations by denying them the use of community antenna systems to receive television service. Economic and population limitations have precluded the full realization of the Commission's minimum service goals, and they should not be made the arbitrary basis for perpetuating this situation. Thus there is no difference between this case and Fortnightly on that score.

CONCLUSION

This case involves a great deal more than copyright infringement by a few cable television systems. The economic and policy considerations alone portend tremendous ramifications, affecting as it does not only the structure of an entire industry but also the very essence of the FCC's scheme for maximizing television service to the American public. NCTA submits that the questions presented by this case are clearly worthy of this Court's consideration.

Respectfully submitted,

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